



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 82 of 2009**

**NGANDA KALANDI.....PLAINTIFF**

**VERSUS**

**TIMOTHY MUTINDA NZIOKA.....DEFENDANTS**

**RULING**

By a plaint dated 27<sup>th</sup> March, 2009 and filed against the defendant, the plaintiff sought the eviction of the defendant from land parcel Mbooni/Itetani plot No. 177 hereinafter referred to as “*the suit premises*”, costs of the suit as well as interest. Simultaneously with the filing of the suit the plaintiff moved the court by way of a Chamber Summons application dated 27<sup>th</sup> March, 2009 seeking several orders under the then Order 39 of the Civil Procedure Rules. Among the orders sought was for an injunction to restrain the defendant from trespassing, grazing or in any other way dealing with the suit premises pending the hearing and determination of the main suit.

The defendant countered the plaint and the application by filing a defence on 23<sup>rd</sup> April, 2009 and a replying affidavit sworn on the 22<sup>nd</sup> April, 2009. From the pleadings of the plaintiff, his position appears to be as follows:-

- Sometimes in 1978, he entered into an agreement of sale of the suit premises, with the defendant which property had not been registered then.
- The only value agreed upon when determining the consideration was for the land and it excluded the trees whose value was to be determined at a later date.
- The initial agreed consideration was Kshs. 12,300/=. However, subsequent agreements led to payment of Kshs, 2000/= to cover various expenses and Kshs. 28,000/= would be the final payment thereby making the total purchase price Kshs. 42,300/=.
- The defendant only paid a sum of Kshs. 2000/= and therefore the plaintiff opted to rescind the contract.
- Despite the rescission of the agreement the defendant had continued to occupy the suit premises and in fact took advantage of the plaintiffs illness in December, 2008 to put up a permanent house in record of 2 weeks
- Unless the injunction prayed for is issued, the suit premises was in danger of alienation and therefore the plaintiff is likely to suffer irreparable loss and damage.

The defendant on the other hand has posited that;--

- There is no substratum upon which the application is founded
- The claim is time barred
- The claim by the plaintiff is unsuitable in that the procedure followed is improper
- The application as founded lacks any basis and seeks prayers which are at variance with those in the purported suit
- The purchase price agreed upon was Kshs. 37,200/= an amount which the defendant promptly paid.
- No evidence of the defendant's indebtedness has been demonstrated to impugn the defendant's proprietary interest in the suit premises.
- No case has been borne out for grant of injunction against the defendant

When the application came before **Lenaola, J** for *interpartes* hearing on 1<sup>st</sup> July, 2009 he directed that the parties canvass the same by way of written submissions. However, it was not until 27<sup>th</sup> July, 2012 that the submissions were on board. By then **Lenaola, J** had left the station on transfer. The task of concluding the application therefore fell on me. Parties agreed that I act on the submissions, craft and deliver the ruling.

- It is common ground that, the defendant has been in occupation of the suit premises since the year 1978.
- It is also common ground that the defendant has a building in place. It is also common ground that the plaintiff is seeking to restrain that which he admits has taken place.
- It is evident from the annexures on either side that the defendant relying on the sale agreement has invested heavily in the premises.
- Finally it is common ground that the plaintiff never transferred the property/part purchased to the defendant

The defendant claims that the plaintiff's suit is barred under section 7 of Limitation of Actions which provides inter alia;-

***“an action may not be brought by any person to recover land after the end of twelve years from the date on which the rights of action accrued to him or, if it is first accrued to some person through whom he claims, to that person.”***

The defendant acquired proprietary interest in the property in the year 1978. This suit was filed in 2009. It may well be true that the suit is time barred. However at this interlocutory stage I am not called upon to make definitive findings on the issue. However, this may well, go to show that infact the plaintiff's suit may not see the light of day.

The plaintiff has sought a seminal order of interlocutory injunction to restrain the defendant from certain acts. A careful scrutiny of the plaint shows that the plaintiff seeks only one substantive order of eviction. No order is sought for injunction both permanent and mandatory. The application therefore lacks the requisite substratum to survive.

It is trite law that an interlocutory injunctive relief cannot be granted where there is no relief in the nature of a permanent injunction prayed for in the plaint. To grant an injunction in those circumstances will be

tantamount to doing so in vacuo. See **Shah vs Shah [1978] KLR 374** and **Southern Credit Banking Corporation Limited vs Charles Wachira, HCCC No. 1780 of 2000 [UR]**. The plaintiff concedes that the defendant entered the property in 1978 and has done some developments thereon. It is therefore a flat contradiction in terms for the plaintiff to seek to injunct the defendant for acts acknowledged to have taken place over thirty years and under his nose. As correctly submitted by counsel for the defendant, the application is it surreptitious way of evicting the defendant before trial. In the case of **Mohammed K. Abdulaziz & 2 others vs The Commission of Lands & 2 Others [2006] eKLR**, it was held that it would be futile to seek to restrain a party from doing acts that have already taken place. If the plaintiff had any issue with the acts that have taken place so far, then his remedy would procedurally lie elsewhere.

The issues raised above once weighed against the time honoured principles on granting of interlocutory injunction as established in the **Giella vs Cassman Brown and Co. Ltd [1973] E.A. 358** clearly shows that the plaintiff has not met the threshold.

In other words, a *prima facie* case with probability of success has not been established. Having not prayed for an injunction in the main suit, the plaintiff cannot seek it in an interlocutory application nor has the plaintiff demonstrated the irreparable loss that he may suffer that cannot be adequately compensated by an award of damages.

The Acts which the plaintiff seeks to restrain the defendant against have already taken place. On the contrary the defendant who has developed the property stands to be prejudiced by the grant of the application if its activities are stopped. Furthermore, the plaintiff having submitted that the suit premises are occupied by the defendant, that all along they were being used by the defendant for various purposes, cannot now turn around and hold as well as state that the said status would result in irreparable loss.

No doubt the convenience of situation favours the defendant. This is a party who has developed the suit premises and has for over thirty years maintained the same.

In the upshot, the plaintiff having not demonstrated to the court any basis upon which the application for injunction can be allowed, the same is hereby dismissed with costs to the defendants.

**DATED at MACHAKOS this 22<sup>ND</sup> day of NOVEMBER, 2012.**

**ASIKE-MAKHANDIA  
JUDGE**

**DATED, SIGNED and DELIVERED at MACHAKOS this 30<sup>TH</sup> day of NOVEMBER, 2012.**

**GEORGE DULU  
JUDGE**